Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-519-1993
EUSOFF CHIN CHIEF JUDGE, EDGAR JOSEPH JR AND WAN YAHYA FCJJ
28 SEPTEMBER 1995

Companies and Corporations *— Directors — Loan to director — Director obtained loan from third party — Loan secured by charges over company's land — Loan actually received by company — Whether charge illegal and void — Effect of s 133(5) — Companies Act 1965 s 133(1) & (5)*

The Co-operative Central Bank Ltd ('the chargee society'), a co-operative society registered under the Co-operative Societies Act 1948 ('the CSA'), had, according to the documents in the case, granted a loan of RM3m to one Lim Kon Kwee ('the borrower') who was a director of Feyen Development Sdn Bhd ('the chargor company'). The affidavit evidence, however, showed that the loan was ultimately received by the chargor company. As security for the loan, two charges were created ('the charges') over two pieces of land belonging to the chargor company ('the land') in favour of the chargee society. The chargor company later defaulted, and the chargee society commenced two charge actions in the High Court praying for, inter alia, orders of sale of the lands. On the other hand, the chargor company commenced separate proceedings, praying for declarations that the charges were illegal, void and unenforceable by reason of breach of s 133(1) of the Companies Act 1965 ('the Act') which prohibits a company, inter alia, from providing any guarantee or security for a loan given to its directors by a third party. The sole question for decision in the proceedings was whether a breach of s 133(1) of the Act had any civil consequences with regard to the validity of the charges, ie whether the charges given in breach of s 133(1) were valid and enforceable against the chargor company. The trial judge decided in favour of the chargor company, and accordingly ordered the cancellation of the registration of charges and the return of the documents of title to the chargor company. The chargee society appealed.

Held, allowing the appeal:

(1) The general rule is that where a contract is prohibited by statute expressly or by implication, and the statute stipulates for penalties for those entering into it, the contract shall be void and unenforceable, unless saved by the statute itself or there are contrary intentions which can reasonably be read from the statute. However, the general rule is subject to exceptions, and it is a question of construction of the particular statute. There appears to be a trend for courts to be less ready to find a contract illegal or unenforceable simply by reason of a statutory provision.

(2) Section 133 of the Act does not state that a guarantee entered into or any security given in contravention thereof is to be void, although criminal liability would be imposed on the official of the company concerned, and on the company itself, by virtue of s 369(1)(a) and 369(2) of the Act.

(3) However, s 133(5), which states that a company may recover the loan amount or any amount for which it becomes liable under any guarantee or security given contrary to the section, implies that notwithstanding that a guarantee or security may have contravened s 133(1), the company may incur civil liability under it and can have recourse against the director/borrower. In order for the company to be liable, the guarantee or security must be valid and enforceable.

(4) Section 133 was designed for the protection of the company, its shareholders and creditors from unlawful dissipation of its assets for the benefit of its directors and their associates. The court would not aid a company which sought to rely on its own breach to escape its obligations, unless that was what the clear language of the statute required.

(5) In this case, it was clear that the loan had been received by the chargor company and that its assets were not being depleted through misuse. In reality, the chargor company was seeking to avoid repayment of the loan and to get back its land free of the charges. To admit the defence of illegality would provide a windfall gain to the chargor company and defeat the purposive interpretation of s 133.

(6) Although the charge transactions did breach s 133(1) of the Act, no civil consequences flowed therefrom, ie no voidness or unenforceability attached to the loan or the charges, having regard to the context and purpose of s 133(1), and especially the principle underlying s 133(5), which the trial judge failed to take into account or to give proper weight to.

Obiter:

The effect of s 57 of the CSA, which states that the provisions relating to, inter alia, societies and companies, shall not apply to societies registered under the CSA, is merely to exempt a co-operative society registered under it from compliance with the requirements of the Act. It does not prevent a company from relying on s 133 of the Act by way of defence, to proceedings brought against it by a co-operative society to enforce a security given in a loan granted to a director of the company.

[Bahasa Malaysia summary

Co-operative Central Bank Ltd ('pertubuhan pemegang gadaian'), sebuah koperasi yang didaftarkan di bawah Akta Pertubuhan Koperasi 1948 ('APK'), mengikut dokumen di dalam kes ini, telah memberikan

suatu pinjaman berjumlah RM3 juta kepada seorang bernama Lim Kon Kwee ('peminjam') yang merupakan seorang pengarah Feyen Development Sdn Bhd ('syarikat penggadai'). Walau bagaimanapun, keterangan afidavit menunjukkan bahawa pinjaman tersebut akhirnya diterima oleh pertubuhan pemegang gadaian. Sebagai cagaran untuk pinjaman tersebut, dua gadaian telah dibuat ('gadaian itu') atas dua bidang tanah yang dipunyai oleh syarikat penggadai ('tanah itu') yang memihak kepada pertubuhan pemegang gadaian. Syarikat penggadai kemudiannya ingkar, dan pertubuhan pemegang gadaian telah memulakan dua tindakan gadaian di Mahkamah Tinggi untuk memohon, antara lain, perintah jualan tanah itu. Sebaliknya, syarikat penggadai pula memulakan prosiding yang berasingan, untuk memohon deklarasi bahawa gadaian tersebut adalah menyalahi undang-undang, terbatal dan tidak boleh dikuatkuasakan akibat perlanggaran s 133(1) Akta Syarikat 1965 ('Akta itu') yang menghalang suatu syarikat, antara lain, daripada memberikan sebarang gerenti atau cagaran untuk pinjaman yang diberikan kepada pengarah syarikatnya oleh suatu pihak ketiga. Soalan tunggal untuk diputuskan di dalam prosiding ini ialah sama ada perlanggaran s 133(1) Akta itu mempunyai kesan sivil berkenaan dengan kesahan gadaian tersebut, iaitu sama ada gadaian yang diberikan yang melanggar s 133(1) itu sah dan boleh dikuatkuasakan terhadap syarikat penggadai. Hakim perbicaraan membuat keputusan yang memihak kepada syarikat penggadai, lalu memerintahkan pembatalan pendaftaran gadaian itu, dan pengembalian suratan hak milik kepada syarikat penggadai. Pertubuhan pemegang gadaian telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Mengikut rukun am, di mana suatu kontrak dihalang oleh statut secara nyata atau tersirat, dan statut itu menetapkan penalti untuk orang yang mengikatnya, kontrak tersebut adalah terbatal dan tidak boleh dikuatkuasakan, kecuali jika diselamatkan oleh statut itu sendiri atau terdapat niat bertentangan yang boleh dibaca daripada statut itu secara munasabah. Walau bagaimanapun, rukun am itu adalah tertakluk kepada kekecualian, dan ia merupakan suatu soalan pentafsiran setiap statut yang berkenaan. Nampaknya terdapat suatu arah aliran untuk mahkamah menjadi kurang bersedia untuk mendapati bahawa sesuatu kontrak itu menyalahi undang-undang atau tidak dapat dikuatkuasakan semata-matanya atas sebab sesuatu peruntukan statut.

(2) Seksyen 133(1) Akta itu tidak menyatakan bahawa gerenti atau cagaran yang diberikan oleh suatu syarikat yang melanggar seksyen tersebut adalah terbatal, walaupun liabiliti jenayah akan dikenakan ke atas pegawai yang berkenaan dan syarikat itu di bawah s 369(1)(a) dan 369(2) Akta itu.

(3) Walau bagaimanapun, s 133(5), yang menyatakan bahawa sebuah syarikat boleh mendapatkan balik jumlah pinjaman itu atau apa-

apa jumlah untuk mana ia menjadi bertanggungjawab di bawah mana-mana gerenti atau cagaran yang diberikan yang melanggar seksyen itu, menandakan bahawa meskipun sesuatu gerenti atau cagaran mungkin melanggar s 133(1), syarikat itu mungkin menanggung liabiliti sivil di bawahnya dan boleh mengambil tindakan terhadap pengarah/peminjam itu. Sebelum syarikat itu boleh dikenakan liabiliti, gerenti atau cagaran itu mestilah sah dan boleh dikuatkuasakan.

(4) Seksyen 133 adalah direka untuk perlindungan syarikat itu, pemegang saham dan pemiutangnya daripada kehilangan asetnya secara haram untuk faedah pengarahnya dan rakan mereka. Mahkamah tidak akan membantu sebuah syarikat yang ingin bergantung pada perlanggarannya sendiri untuk melepaskan diri daripada obligasinya, kecuali jika itu merupakan apa yang diperlukan oleh bahasa jelas statut itu.

(5) Dalam kes ini, adalah jelas bahawa pinjaman itu telah diterima oleh syarikat penggadai dan bahawa asetnya tidak dikurangkan akibat penyalahgunaan. Sebenarnya, syarikat penggadai sedang mencari jalan untuk mengelakkan diri daripada pembayaran kembali pinjaman itu dan untuk mengambil balik tanah itu bebas daripada gadaian. Penerimaan pembelaan kepenyalahan undang-undang hanya akan memberikan keuntungan bagai durian runtuh kepada syarikat penggadai, dan dengan itu menggagalkan pentaksiran purposif s 133.

(6) Walaupun transaksi gadaian itu melanggar s 133(1) Akta itu, tiada kesan sivil yang diakibatkan olehnya, iaitu pinjaman atau gadaian itu tidak dijadikan tidak sah atau tidak boleh dikuatkuasakan, memandangkan konteks dan niat s 133(1), dan terutamanya prinsip yang mendasari s 133(5), yang hakim perbicaraan gagal mempertimbangkan atau mementingkan secara wajar.

Obiter:

Kesan s 57 APK, yang menyatakan bahawa peruntukan yang berkaitan dengan, antara lain, pertubuhan dan syarikat, tidak terpakai kepada pertubuhan yang didaftarkan di bawah APK, hanya mengecualikan suatu pertubuhan koperasi yang didaftarkan di bawahnya daripada mematuhi syarat-syarat Akta itu. Ia tidak menghalang sebuah syarikat daripada bergantung kepada s 133 Akta itu sebagai pembelaan, kepada prosiding yang dibawa terhadapnya oleh pertubuhan koperasi untuk menguatkuasakan suatu cagaran yang diberikan di dalam suatu pinjaman yang diberikan kepada pengarah syarikat itu.]

Notes

For a case on loan to directors, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 97.

Cases referred to

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1990] 2 MLJ 365 (overd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (folld)
Co-operative Central Bank Bhd v Syarikat Bukit Tinggi & Ors [1991] 1 CLJ 590 (folld)
Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369 (folld)
Corumo Holdings Ltd & Ors v C Itoh Ltd & Ors (1990) 3 ACSR 438; (1991) 5 ACSR 720 (folld)
Curtis's Furnishing Stores Ltd (In liquidation) v Freedman [1966] 2 All ER 955; [1966] 1 WLR 1219 (folld)
Farrow Mortgage Services Pty Ltd (In liquidation) v Edgar & Ors (1993) 114 ALR 1 (refd)
Heald v O'Connor [1971] 2 All ER 1105; [1971] 1 WLR 497 (not folld)
Holman v Johnson (1775) 98 ER 1120 (folld)
JC Scott Constructions v Mermaid Waters Tavern Pty Ltd [1984] 2 Qd 413 (refd)
Kasumu v Baba-Egbe [1956] 3 All ER 266; [1956] 3 WLR 575 (folld)
Littlewood v George Wimpey & Co [1953] 2 All ER 915 (refd)
Selangor United Rubber Estates Ltd v Craddock (No 3) [1968] 2 All ER 1073; [1968] 1 WLR 1555 (not folld)
Victor Battery Co Ltd v Curry's Ltd [1946] Ch 242; [1946] 1 All ER 519 (folld)
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 (folld)

Legislation referred to

Banking and Financial Institutions Act 1989 s 45(1)
Companies Act 1965 ss 6, 133(1), (4), (5), 369(1)(a), (2)
Co-operative Societies Act 1948 s 57
National Land Code 1965 ss 256(3), 257(1)–(3)
Companies Act 1948 s 190 [UK]
Companies Act 1985 ss 330–334 [UK]
Companies Act 1961 s 125 [Aust]
Companies Act 1981 ss 230, 234 [Aust]
Companies Code 1981 ss 8(8), 230 [NSW]
Uniform Companies Enactments 1961 s 125 [Aust]

Appeal from: Originating Summons No 31–266–1986 (Originating Summons No 31–351–1988 consolidated with Civil Suit No 22–18–1991) (High Court, Seremban)

Vijendran Ponniah (*Murali Achan* with him) (*Vije & Co*) for the appellant.
Hira Singh (*Asbir Kaur* with him) (*Asbir Hira Singh & Co*)

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court): This appeal arises from proceedings by way of originating summonses in the High Court, Seremban, which raised the vexed question of whether there are any civil consequences which flow from a breach of s 133(1) of the Companies Act 1965 ('the Act'), upon the validity of two loan and charge transactions registered under the National Land Code 1965 ('the Code').

To put matters in perspective, the provisions of the Act, which it would be convenient to reproduce are s 133(1), (4) and (5). The provisions read as follows:

> 133 Loans to directors
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> (1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person but nothing in this section shall apply —
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> (a) subject to subsection (2), to anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;
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> (b) to anything done to provide such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, with funds to meet expenditure incurred or to be incurred by him in purchasing or otherwise acquiring a home; or
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> (c) to any loan made to such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, where the company has at a general meeting approved of a scheme for the making of loans to employees of the company and the loan is in accordance with that scheme.
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> (4) Where a company contravenes this section any director who authorizes the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence against this Act.
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> Penalty: Ten thousand ringgit.
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> (5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section.

Touching on the background and effect of the Australian equivalent of the Malaysian s 133, being the Australian Companies Act 1981 s 234, Prof HAJ Ford in his book, *Ford's Principles of Corporations Laws* (6th Ed), has this to say (at para 1525, pp 517–518):

> Companies legislation in s 232(2) [Malaysian s 132(1)] states the duty of good faith in very broad terms as a duty to act 'honestly'. One aspect of that duty is to refrain from applying the company's resources otherwise than for the benefit of the company as a whole. In companies legislation there are scattered measures on aspects of that duty. The various measures deal only with limited contexts (for example, s 232(5) dealing with improper use of

company information) in which the duty exists. For such contexts the specific provisions emphasize the basic duty. That legislative emphasis is found in connection with a loan by a company to its director because such a transaction can readily waste a company's resources. Section 234 regulates such loans but in addition to and not in derogation of other law. Presumably, that means that even if a loan is permitted by the legislation, the directors who sanction that loan must consider whether the transaction is for the benefit of the company and not prejudicial to the interests of its creditors.

The legislation stems from a recommendation of the Cohen Committee in the United Kingdom who said that it was undesirable that a director should borrow from the company: if the director could offer good security, it would be no hardship to borrow elsewhere; if good security could not be offered, the director should not borrow from the company. In enacting a strict rule about loans to directors the legislature treats directors like trustees and forbids this form of self-dealing without any provision for the director to be absolved by showing that the particular loan was not prejudicial to the company.

Section 234 forbids, subject to exceptions, a company making a loan to a director or certain other persons, bodies corporate or trusts related to a director. It also forbids the giving of a guarantee or the provision of security in connection with another lender's loan to a director or related person or entity.

Bearing in mind the words of Prof Ford quoted above, we now embark upon a consideration of the vexed question of law, posed by the present appeal, to which we referred, at the outset.

For brevity and convenience, we shall refer to the appellant, the Co-operative Central Bank Ltd, which was the plaintiff in the court below, and the respondent, Feyen Development Sdn Bhd, which was the defendant in the court below, as 'the chargee society' and 'the chargor company', repectively, unless the context otherwise requires.

The essential facts, which led up to the litigation in which this appeal arises, may be taken in substance from the statement of agreed facts and issues, which was put in at the trial and may be stated thuswise:

At all material times, the chargee society was registered as a co-operative society under the Co-operative Societies Act 1948, while the chargor company, was a privately incorporated company registered under the Act, although not a private exempt company as therein defined, and the person said to be the borrower was a certain Lim Kon Kwee ('the borrower'), a member of the chargee society as well as a director of the chargor company.

According to the contemporary documents in the case, the chargee society had lent to the borrower a sum of RM3m on the security of two charges registered and created under the Code, bearing presentation Nos 8279–83 Jilid 435 Folio 27 and 1447/83 Jilid 73 Folio 66 ('the charges') by the chargor company, over its lands comprised in Grant No 16397 for Lot 12590, situated in Bandar Seremban, in the state of Negeri Sembilan and in EMR No 655, for Lot No 1519, situated in the mukim of Ampangan, in the state of Negeri Sembilan ('the lands'), respectively, in favour of the chargee society.

In the event, the chargor company having committed default under the charges, the chargee society commenced proceedings, namely, two separate charge actions to wit, Originating Summonses 266/86 and 351/88, praying, inter alia, for orders of sale, of the lands. On the other hand, the chargor company commenced separate proceedings, being civil suit 18/91, praying for declarations that the charges were illegal, void and unenforceable by reason of breach of s 133(1) of the Act.

Before the learned judge in the court below, the chargee society and the chargor company had, through their counsel, agreed that the sole question for decision in the proceedings hereinbefore mentioned was whether the effect of a breach of s 133(1) of the Act, had any, and if so, what civil consequences with regard to the validity of the charges aforesaid.

In the event, the learned judge answered this question in favour of the chargor company by holding that it was entitled to the declarations it had prayed for, that is to say, that the charges and the contract of loan for which the charges had been executed by way of security were illegal, void and unenforceable, and he accordingly made the necessary consequential orders for cancellation of the memorials in the register document of title and the issue documents of title, and return of the issue documents of title to the chargor company. It is from the whole of this decision that the chargee society has appealed to this court.

We note — in passing, only – and without placing undue stress on the point, that although nowhere in the statement of agreed facts and issues was any mention made as to the use, purpose or object of the loan, repayment of which was secured by the charges, there was clear evidence on this point, emanating from the affidavit of a certain Kwan Teck Yang, a co-director and co-subscriber of the borrower, to the memorandum of association of the chargor company, wherein by para 2, it was freely admitted:

> It is true the company was given a RM3m loan and as security for the said loan, property held under Grant No 16397 Lot No 12590 Bandar Seremban and property held under EMR No 655 Lot 1519 mukim of Ampangan, Seremban was charged to the plaintiff. The value of these properties was at RM10m.

It can therefore be reasonably inferred that at all material times Kwan Teck Yang was fully aware of the purpose, use or object of the loan. Indeed, it is he who, as director of the chargor company, had created the charges on behalf of the chargor company, and it is he who is now attempting to invalidate them on the ground that s 133(1) had been breached (see pp 200 and 263 of the appeal record).

Thus, although, on the face of the documents in the case, the borrower was said to be Lim Kon Kwee, it can also be reasonably inferred from the admission in the affidavit of Kwan Teck Yang (quoted above), that the loan of RM3m was ultimately received by the chargor company, and, as we have said, it is the chargor company which is now seeking to avoid the charges by seeking refuge in s 133 of the Act. Thus, there is no question here of the assets of the chargor company being depleted through misuse. Indeed, the position is quite the opposite; the chargor company is,

in reality, seeking to avoid repayment of a loan it had obtained and, at the same time, to get back its lands free of the charges. But, this is a court of law and not a court of morals, so that if the chargor company is correct in its contention on the law, it is entitled to succeed.

For the avoidance of doubt, we hasten to add, that since it was agreed in the court below that the charge transactions had breached s 133(1) of the Act and, it was on this basis, that the learned judge had conducted and decided the case, we should do likewise.

It is obvious that s 133 of the Act does not in terms say that a guarantee entered into or any security given in contravention thereof is to be void, although this would result in the imposition of criminal liability on the official of the company concerned, and on the company itself, by virtue of the general penalty provisions contained in ss 369(1)(a) and 369(2) of the Act.

Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. (See *Holman v Johnson* (1775) 98 ER 1120 at p 1121; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356.) However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute. This point was aptly put by Gibbs CJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 thuswise:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a *general rule*, but for complete accuracy it needs qualification, because *it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable.* However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. *Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.* (Emphasis supplied.)

In *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1994] 1 MLJ 369 at p 378, a case where the validity of a contract entered into in breach of s 45(1) of the Banking and Financial Institutions Act 1989, was in question, we had occasion to quote with approval the above passage in the judgment of Gibbs CJ.

We have also read with much profit the judgment of McPherson J in *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd 413.

We note that Greig and Davis on the *Law of Contract*, at pp 1117ff, say that they see a trend in decisions whereby courts are now less ready to find a contract illegal or unenforceable simply by reason of a statutory provision.

And, we also note that in *Farrow Mortgage Services Pty Ltd (In Liquidation) v Edgar & Ors* (1993) 114 ALR 1, the following principles of illegality were enunciated by the court (Lockhart, Gummow and Lee JJ) at pp 9 and 10:

> In his article 'Restitutionary Recovery of Benefits Conferred under Contracts in Conflict with Statutory Policy — The New Golden Rule' (1987) 25 Osgood Hall LJ 787 at pp 788–789, Prof McCamus describes the 'continued and remarkable growth of regulation in the modern era' as having created an environment which is rather different from that in which the English courts formulated the approach of common law to illegality in contract; the commission of any offence then was perhaps more likely a signal of significantly anti-social conduct than it is today.
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> The learned author also points out that when agreements have been entered into which create a conflict with the letter or the spirit of a regulatory legislative scheme, two problems emerge for resolution by the law of private obligations. The first concerns the validity of the agreement itself. The second concerns the secondary consequences for the parties, and third parties, if the agreement is indeed held to be unenforceable or void. Statute may render the agreement unenforceable without being void but, if void, it must, of necessity, be unenforceable: see *Lejo Holdings Pty Ltd v Deutsche Bank (Asia) AG* [1988] 2 Qd R 30 at p 41.
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> In Australia, the relevant principles, as settled, are largely to be found in the expositions in the judgments in *Yango Patsoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; 21 ALR 585. Counsel for both sides accepted that this was so. We have also been much assisted by the judgment of McPherson J in *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 cited by the respondents.

And, in *Yango*, Mason J (as he then was) said at p 429:

> There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished — see my judgment in *Jackson v Harrison* (1978) 138 CLR 438 at p 452. See also the suggestions that the principle cannot apply to all statutory offences (*Beresford v Royal Insurance Co Ltd* in the Court of Appeal [1937] 2 KB 197 at p 220, per Lord Wright; *Marles v Philip Trant & Sons Ltd* [1954] 1 QB 29 at p 37), per Denning LJ, and that it would be a curious thing if the offender is to be punished twice, civilly as well as criminally (*St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at p 292), per Devlin J. The main considerations from which the principle *ex turpi causa* arose can be seen in the reluctance of the courts to be instrumental in offering an inducement to crime or removing a restraint to crime: *Beresford's Case* [1938] AC 586 at pp 586, 599; *Amicable Society v Bolland (Fauntleroy's Case* (1830) 4 Bligh (NS) 194 at p 211; 5 ER 70, at p 76).
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> However, in the present case Parliament has provided a penalty which is a measure of the deterrent which it intends to operate in respect of non-compliance with s 8. In this case it is not for the court to hold that further consequences should flow, consequences which in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or investors.

It is with the above general principles in mind that we must now consider, in greater detail, the vexed question of law aforesaid.

In *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1990] 2 MLJ 365, a third party charge, created in favour of a lender as security for an illegal loan granted by the lender to a director of the chargor company, was held by NH Chan J (as he then was) to be void and unenforceable for breach of the prohibition imposed by s 133(1) of the Act. In so holding, his Lordship relied heavily on an array of English and Australian decisions.

In a well researched article entitled 'Section 67 of the Companies Act: A Hornet's Nest?' by Mr Lai Chin Sum, reported in [1992] 2 MLJ xi, criticism has been levelled against NH Chan J for his 'wholesale importation and adoption', in *Che Wan* of Australian and English authorities, passages in *Palmer's Company Law* and an Australian textbook, namely, *Ford's Company Law* (2nd Ed).

Section 67 of the Act provides:

> 67 Dealing by a company in its own shares, etc
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> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.
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> (2) Nothing in subsection (1) shall prohibit —
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> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
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> (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, or a subsidiary of the company including any director holding a salaried employment or office in the company or a subsidiary of the company; or
>
> (c) the giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.
>
> (3) If there is any contravention of this section, the company is, notwithstanding section 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
> Penalty: Imprisonment for five years or one hundred thousand ringgit.
>
> (4) Where a person is convicted of an offence under subsection (3) and the Court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of

such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court. A

(5) The power of a Court under section 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) of this section from the liability to have such an order made against him. B

(6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section. C

Mr Lai has gone on to make the following general observation — the soundness of which cannot be doubted:

> Without in any way doubting the wisdom and worth of foreign authorities as an aid for statutory interpretation if the relevant provisions are in pari materia with the Malaysian provisions, it is respectfully submitted that where the actual wording of a Malaysian statute differs from a foreign statute, albeit similar, greater scrutiny of the Malaysian statute is required notwithstanding the availability and assistance of foreign authorities to ensure an accurate and meaningful construction of the local statute. D

And, more particularly, directing attention to the differences between s 67 of the Act and the comparative legislation in England and Australia, he has added — persuasively, if we may say so: E

> The writer respectfully submits that although the Malaysian s 67 is substantially similar in wording to the former English and Australian provisions, there are two material differences. Firstly, the prohibition under both the English and Australian provisions was so complete that the company itself was made a party to the offence, whereas under the Malaysian provision, only the officers of the company and not the company are guilty of the offence. F
>
> Secondly, neither the Australian nor the English statutes have an equivalent provision to the Malaysian s 67(6). Section 67(6) reads: G
>
> > 'Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of this section.'
>
> These differences are material because they suggest that a prohibited transaction may not be totally devoid of legal effect. Thus, English and Australian authorities which held that a prohibited transaction was void for being illegal must be carefully read in this perspective. H

However, when it comes to s 133 of the Act, an examination of the comparative legislation in the Australian Companies Act 1961 s 125, 1981 s 230, the United Kingdom 1948 s 190, 1985 ss 330–334, reveals that there *are* provisions there equivalent to our s 133(5). Indeed, our sub-ss (4) and (5) (reproduced supra) are taken from the equivalent Australian section. I

It is certainly arguable — and persuasively so — that sub-s 5 of s 133 of the Act implies that notwithstanding that a guarantee or security given by a company may have contravened s 133(1), the company may incur civil liability under it, in which case it will have a right of recourse against the director/borrower. To quote Mr Walter Woon in his book on *Company Law*, at p 179, when referring to the Singapore equivalent (s 162(5)) of our s 133(5), he pertinently asks: 'How can the company be liable under the guarantee or security unless they are valid and enforceable against it?'

In *Littlewood v George Wimpey & Co* [1953] 2 All ER 915 at p 921, Lord Denning LJ (as he then was) thought that 'liable' denotes that '... a person is responsible at law'. Similarly, the *Oxford Companion to Law*, explaining the word 'liability' says: 'A person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something.'

Referring to the comparative legislation in Australia, to wit, Australian Companies Act 1981 s 230 (previously s 125 of the 1961 Uniform Companies Enactments), the concept of which was imported from s 190 of the Companies Act 1948 of the United Kingdom (later repealed and replaced in far more extensive and stringent form by the Companies Act 1980 (UK) ss 49–52 and 63), Paterson Ednie and Ford in their work on *Australian Company Law* (3rd Ed) Vol 2 — Commentary Annotations — para 230/1 under the sub-heading 'Introduction' dated 2 September 1988, pertinently state — and we agree — that:

> In so far as this section enables the company to recover moneys in respect of a security, it is evidently designed with the decision in *Victor Battery Co Ltd v Curry's Ltd* [1946] Ch 242; [1946] 1 All ER 519, in mind.

We would remark, in passing, that in *Victor Battery Co Ltd v Curry's Ltd* [1946] Ch 242; [1946] 1 All ER 519, it was held that a mortgage of a company's assets was valid and enforceable although it was given as security for a loan to the company which the lender knew would be used to assist someone to acquire shares in the company. This decision was followed by Cross J in *Curtis's Furnishing Stores Ltd (In liquidation) v Freedman* [1966] 2 All ER 955; [1966] 1 WLR 1219 though it was doubted in *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073 at p 1153; [1968] 1 WLR 1555 at p 1646, and disapproved and not followed in *Heald v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497.

It goes without saying that if — and indeed, we so hold — that the principle in *Victor Battery* has been statutorily recognized in s 133(5) of the Act, then the fact that it has been held to be wrong or described as 'heretical' by Mr LCB Gower in his book *Principles of Modern Company Law* (5th Ed) at p 237, would not matter, so far as our courts are concerned, for it would be their duty to give effect to the will of Parliament as expressed in the law.

We note that in *Co-operative Central Bank Bhd v Syarikat Bukit Tinggi & Ors* [1991] 1 CLJ 590, in considering the question whether an alleged breach of s 133(1) of the Act, had the civil consequences of rendering a charge transaction void and unforceable, the High Court, Penang, declined

to follow *Che Wan* on the ground that it was decided per incuriam in that NH Chan J had overlooked: A

(i) section 57 of the Co-operative Societies Act 1948 which says that the provisions of the laws for the time being in force relating to trade unions, associations, societies and companies, shall not apply to societies registered under the Co-operative Societies Act 1948, the plaintiff there being such; and also B

(ii) the effect of s 133(5) of the Act, as explained by Mr Walter Woon in his book on *Company Law*, quoted above.

With great respect, in our view, s 57 of the Co-operative Societies Act 1948 , merely exempts a co-operative society registered under the Co-operative Societies Act 1948 from compliance with the requirements of the Act. In other words, s 57 does not prevent a company from relying on s 133 of the Act *by way of defence*, to proceedings brought against it by a co-operative society, for enforcement of a security given in connection with a loan made by the co-operative society to a director of such company or of a company which, by virtue of s 6 of the Act, is deemed to be related to such company, assuming, for the sake of argument, a breach of s 133(1) has the civil consequence of invalidating the transaction concerned. C D

However, we respectfully agree that the effect of s 133(5) of the Act is of direct relevance to the question whether a breach of s 133(1) of the Act has the civil consequences contended for by counsel for the chargor company. It would be more convenient if we revert to the case of *Co-operative Central Bank*, in the concluding stages of this judgment. E

In the meanwhile, to return to *Che Wan*, a perusal of NH Chan J's judgment shows that there was a reference in it to s 133(5) of the Act but he did not address the question whether s 133(5) of the Act is a statutory emanation of *Victor Battery* and, if it is, what are the consequences which flow therefrom. So far as relevant to this part of the case, this is what he said: F

> It can be seen at once that ss 67(6) and 133(5) are similar in terms to s 230(7) of the Australian Companies Code 1981. What is said in Ford, *Company Law* (4th Ed, 1986) at p 405 (which I have referred to earlier in reference to s 230(7) of the Australian Companies Code 1981) should be equally applicable to s 133(5) of our Companies Act 1965. As pointed out in Ford, the subsection only applies to the company's right to take action against an errant director without being met by the defence that the transaction is prohibited by statute and is illegal and therefore void. It does not affect any defence of illegality available to the company if it were sued on a transaction entered into in breach of it, thus making the transaction unenforceable against the company. G H
>
> The subsection does not apply if the company were to sue to recover what it had given as guarantee or security to the person who had made a loan to a director of the company so that it would not preclude the defence that because the transaction is tainted with illegality the courts should not assist the company. I
>
> In this judgment, I am only concerned with s 133 of the 1965 Act although any decision on this section concerning the validity of transactions prohibited by the section would be equally applicable to s 67 of the Act.

A Section 133 prohibits a company from the making of loans to its directors as well as the entry into any guarantee or the provision of any security in connection with a loan to a director of the company by another person. And s 67 prohibits a company from giving financial assistance to its directors (or, where it is a subsidiary, to a director of its holding company) for the purchase of its shares.

B Any agreement made in breach of any of the prohibitions in s 67 or s 133 of the Act is illegal, so as to expose the company's officers to penalties. Although s 67 or s 133 do not expressly say that the prohibited transactions are void, this necessarily follows from the fact that the prohibited transactions are made illegal by the Act by subjecting the officers of the company to penalties: *Heald v O'Connor* [1971] 2 All ER 1105; *Dressy Frocks v Bock* C (1951) 51 SR (NSW) 390 at p 393 decided under the Australian Uniform Companies Act 1961, s 67; see also Ford, *Company Law* (2nd Ed, 1978) at p 180. In *Heald v O'Connor*, Fisher J has held that the debenture in that case was prohibited by statute and for that reason was illegal and therefore void. It follows, therefore, that any transaction which has contravened any of the prohibitions in s 67 or s 133 of the Act is illegal and therefore void.

D In any result, I find that the third party charge which was created by the plaintiff company in favour of the defendant co-operative society to secure an illegal loan made by the co-operative society to a director of the plaintiff company was illegal and therefore void and unenforceable by the co-operative society as it had contravened the prohibition in s 133 of the Companies Act 1965 on this type of transaction.

E I therefore grant the declaration that was sought.

The plaintiff company has also sought an order for the cancellation of the registration of the charge on its lands and also for the return of all documents of title.

F The only Australian case where *Che Wan* was considered was *Corumo Holdings Ltd & Ors v C Itoh Ltd & Ors* (1990) 3 ACSR 438, where Rogers CJ refused to follow it.

In *Corumo*, the court was concerned with a tripartite joint venture agreement and the validity of loans granted to a joint venture vehicle. Corumo and the guarantors of the loans contended that they had established G breaches of s 230 of the Companies Code (NSW) 1981 and that in the result a syndicated credit facility agreement was void and unenforceable, subject to s 8(8), which provides that 'relevant interest' in a share 'shall be disregarded' if the 'relevant interest' is that of a trustee and the trustee is a bare trustee. It was further contended that an associated bank guarantee H was void and unenforceable on the same ground.

At the end of the day, Rogers CJ did not find it necessary to rule on whether the impugned transactions had offended s 230 because, even assuming that they did, the breaches were 'highly technical' and so did not result in the loans transaction being rendered void or unenforceable.

I In so holding, Rogers CJ applied a purposive interpretation to s 234 of the Australian companies legislation. He pointed out that the purpose of s 234 was to protect the company, its shareholders and creditors from having its assets misused for the benefit of directors and interests associated with directors. He recognized that whilst it would frustrate Parliament's intention to restrict the scope of s 234, it would be equally unjust to invoke

the section to commercial transactions free from the taint of misapplication of the companies' resources, which the section was aimed at preventing. A

In adverting to *Che Wan*, Rogers CJ observed that the result arrived at in that case would defeat Parliament's purpose as explained above. He added:

> I would suggest that it hardly protects a company from having its assets misused to disable it from recovering its money by enforcing guarantees it had obtained. B

He also made the pertinent observations at p 448, which we respectfully endorse, that 'a commercial judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community'. C

The appeal (see (1991) 5 ACSR 720) based on s 230 was dismissed. On the basic issue of whether there had been a contravention of s 230(1)(a)(iiia) and (iv), the Supreme Court of New South Wales (Kirkby P, Samuels and Meagher JJA) held there had been no contravention of s 230 on the ground that a complete defence was available by reason of s 8(8) on the basis that 'the relevant interest' in the shares was held under a bare trust, which had to be disregarded for purposes of s 230. D

Meagher JA was of the view that applying a purposive approach to s 230(1)(a), 'a loan ought not to attract the prohibition if the director in question has a merely hypothetical, theorethical or notional control of the moneys'. On a further ground also he arrived at the conclusion that there had been no contravention of s 230. He did so, by applying a literal approach to s 8(8) hereinbefore mentioned, which provided a complete defence. E

Nevertheless, Meagher JA did criticize parts of the reasoning of Rogers CJ on the ground that he 'had applied the principles on which he relied too broadly'. This is how he put it (at pp 749–750): F

> His Honour the trial judge, while arriving at the same conclusion as those which I have reached did so by a somewhat different route. He did not find it necessary to come to any conclusion as to whether or not there had been a breach of s 230. His Honour found that the appellants were endeavouring to take advantage of 'highly technical breaches' of the section the purpose of which was 'to avoid corporate abuses of a kind which are totally absent here'. In these circumstances, his Honour held that even assuming the existence of the breaches alleged, no voidness or unenforceability would attach to the loans, because of his view of the scope of the doctrine of illegality currently espoused by the superior courts. One must sympathize with this approach. The alleged breaches were 'technical' in the extreme. Since the purpose of the section was the protection of the lending company, and its shareholders and creditors, it can hardly be conducive to the furtherance of that purpose to deprive the lending company of its apparent rights against the guarantors of its loans. Not even the forensic skills of counsel for the appellants extended to a submission that any of their clients had any merits on the s 230 issue. And, as I say, his Honour undoubtedly came to the right conclusion. But with the greatest respect to him, I think his Honour applied the principles on which he relied somewhat too broadly. G H I

There is no doubt that the general rule is that where a statute expressly prohibits a transaction and stipulates for penalties for those entering into it, such a transaction will be void and unenforceable. That principle is at least as old as *Holman v Johnson* (1775) 1 Cowp 341 at p 343; 98 ER 1120 at p 1121, and see *King v Licensing Court Brisbane; ex p Daniel* (1920) 28 CLR 23 at p 30. However, exceptionally in some cases, such a result may not ensue, bearing in mind the context and purpose of the statutory prohibition. Thus, for example, in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; 21 ALR 585 the High Court of Australia held that a transaction entered into in violation of s 8 of the Banking Act 1959 (Cth) was neither void nor unenforceable. This latter conclusion will the more readily be drawn where to declare a contract void and unenforceable would harm one of the class of persons for whose benefit the statutory provision was made; *Cunningham v Cannon* ([1983] 1 VR 641 at p 646 per King J). A recognition of the strength of those exceptional cases, however, in my view does not solve the present problem. It could hardly be contended that no contract, however blatantly in breach of s 230, was void or unenforceable. If, for example, there were a contract of loan between JC No 100 and Mr Stapleton, or between SA and Mr Inomata, could it seriously be denied that it was both void and unenforceable? And would not that defect remain even if, in all the circumstances, it would found to be on balance beneficial for the lender? One would have to find some doctrine which resulted in the conclusion that some contracts in breach of the section were void and others not; or, alternatively, that the section had the effect of avoiding the provisions of such a contract in so far as they imposed burdens on the lending company but not in so far as they conferred benefits. There is, in my view, no such doctrine of intermittent unilateral voidness known to our law. It therefore becomes necessary in a case such as the present to inquire whether or not a breach of the section, technical or otherwise, has been committed; and in my view such an inquiry eventually leads in this case to the conclusion that it has not.

The appeal by Corumo should therefore be dismissed with costs.

In our view, to admit the defence of illegality to a commercial transaction of the present sort, would defeat a purposive interpretation of sub-ss (1) and (5) of s 133 of the Act which is designed for the protection of the company, its shareholders and creditors from unlawful dissipation of its resources.

We would go further and say that to admit the defence of illegality to defeat the chargee society's application to enforce the charges by way of an order for sale, would, in the words of Mason J (as he then was) in *Yango Pastoral* (at p 428), provide 'a windfall gain' to the chargor company and others in a similar position. In consequence, such a result would impose substantial hardship upon the chargee society for, in the words of Gibbs CJ in *Yango Pastoral* (at p 415, para 1):

> ... if a body corporate were unable to recover money that it has lent, it would be disabled from performing its own obligations, including those owed to its depositors. In those circumstances 'the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute' (*Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB at p 390; *Dalgety and New Zealand Loan Ltd v VC Imeson Pty Ltd* (1963) 63 SR (NSW) 998 at p 1004).

This court will not be astute to lend its aid to enable the chargor company to take advantage of its own default or wrong by relying on its own breach to avoid the charge transactions and thereby escape its obligations thereunder, unless this is what the clear language of the statute is thought to require. (See for example, *Kasumu v Baba-Egbe* [1956] 3 All ER 266 at pp 271I–272A; [1956] 3 WLR 575 at pp 583–584.)

But, to apply s 133 to the present charge transactions so as to produce a result which would exempt the chargor company from the obligations incurred by it thereunder would be tantamount to applying it to commercial transactions which were free from the taint of corporate abuse which the section was designed to counter. However, we repeat, this is not a court of morals but a court of law and, if the counsel for the chargor company is correct in his contentions, he is entitled to succeed.

Fortunately, in our view, sub-s (5) of s 133 enables us to hold that a breach of sub-s (1) of s 133 does not have the result contended for by counsel for the chargor company, for the reasons hereinbefore mentioned. The case of *Co-operative Central Bank Bhd v Syarikat Bukit Tinggi & Ors* was, therefore, rightly decided by Mohamed Dzaiddin J (now a Federal Court judge) in favour of the chargee, on the ground of the effect of sub-s (5) of the Act. It follows, therefore, that the case of *Che Wan* was wrongly decided.

To summarize, our conclusion is that accepting that the charge transactions did breach s 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to the loan or the charge transactions, regard being had to the context and purpose of s 133(1), and especially the principle underlying s 133(5), as explained above, which regrettably the learned judge failed to take into account or to give proper weight to, with the result that his judgment cannot stand.

This appeal therefore succeeds, the judgment of the court below is set aside, the charges must be enforced, no cause to the contrary having been shown within the meaning of s 256(3) of the Code. We accordingly restore and remit the originating summonses concerned to the High Court, Seremban, with a direction to grant the prayers therein, including the prayers for sale of the lands and to make such further or other consequential orders and directions as are required under s 257(1), (2) and (3) of the Code.

The chargor company must pay to the chargee society the costs of the proceedings both here and in the court below. The deposit paid into court by way of security for costs of the appeal will, or course, have to be refunded.

Appeal allowed.

Reported by Prof Ahmad Ibrahim